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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1927.

No. 412

BEDFORD CUT STONE COMPANY, ET AL.,
Appellants,

vs.

JOURNEYMEN STONE CUTTERS' ASSOCIATION OF NORTH AMERICA, ET AL.,
Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

BRIEF RE-STATEMENT OF CASE.

The respondents desire to restate the case as follows: This is an action instituted by appellants for injunction and damages against the Journeymen Stone Cutters'

Association of North America, the officers of such Association and certain affiliated local unions and their officers.

The appellants are cut-stone contractors and quarriers. They are all members of the International Association of Quarriers and Contractors. Beginning with the year 1913, an international working agreement existed between such International Association and the said Journeymen Stone Cutters Association, by the terms of which agreement members of the defendant unions were employed by appellants. This international agreement terminated May 1, 1921, since which time there has been no working agreement between said two organizations.

On May 1, 1921, appellants closed their shops and quarries to members of the defendant unions and a little later organized their workmen into what were termed "independent union." Employment was made conditional upon membership in such "independent unions." Although barred from working for appellants, members of the defendant unions continued to work upon all classes of stone produced by appellants until August 1, 1924. At that time, pursuant to action taken in the International Tri-Annual Convention of said Stone Cutters' Association, held at Cleveland, Ohio, in October, 1923, an order of the executive board of said Association became effective, which order requested all members of said general union to refrain from working on any material which had been planed, turned, cut or semi-finished by men working in opposition to said Association. Some of the stone produced by appellants came within the class designated in

this order and members of said Association have since said date refrained from working upon the stone which has been planed, turned, cut or semi-finished in appellants' shops and quarries.

On October 2, 1924, appellants instituted this action for injunction and damages.

SUMMARY OF PLEADINGS.

To "Appellants' Summary of Pleadings," respondents desire to make the following corrections and additions:

Par. 5—Ans. Respondents say that they have never denominated complainants nor their employes as unfair or circulated lists to that effect; have never refused to work upon and have at all times and are now working upon products produced by complainants by laborers who are not eligible to membership in defendant unions.

Par. 14—Ans. Admit that the competition exists and that the principal producers of artificial stone are unionized and are located outside of the State of Indiana, but deny the existence of any conspiracy or purpose to prevent the sale or use in interstate commerce of complainants' products.

Par. 16—Ans. The practice of sympathetic strikes is denied and respondents say that in no instances has a sympathetic strike been called or threatened by reason of respondents' refusal to work on complainants' products or by reason of the employment of non-union labor on any building where complainants' products are being installed; allege that not more than twenty per cent of the

stone contractors outside of Indiana operate on a closed-shop basis and deny that contractors cannot do business without the consent of respondents and further say that fifty per cent of complainants' shipments is not affected by the order in question.

Par. 17—Ans. Deny that they have engaged in a conspiracy to prevent any person in any state to pursue the trade of stone-cutter, planerman, latheman, etc., and have neither said nor done anything to prevent such pursuit by any person and deny that they have been engaged in a combination to prevent complainants from selling their products in interstate commerce.

Par. 18—Ans. A. Respondents say that a provision to the effect that "no member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association. Any member violating this article shall become automatically suspended," was written into the constitution of the G. U. by the convention of representatives of the membership of all local unions many years previous to May 1, 1921, and was in full force and effect many years prior to May 1, 1921, and deny that they have made it generally known to the public that the employees of complainants are working in opposition to the union but admit that they have made such fact known to the members of the G. U. and its local unions.

B. Deny that they have written notices to customers or prospective customers of complainants that no union members will work on complainants' product and further say that the letter set out in Sub-division B of Par. 18 of

the Bill of Complaint, alleged to have been written by one John Sucklin, secretary-treasurer of Toledo local, was wholly unauthorized and that respondents had no knowledge of such letter until after the institution of this suit.

C. Deny that they have declared orally or in writing that complainants and their products are unfair but allege that they have only declared that stone unfair which is produced by complainants by labor eligible to membership in the unions, and deny the publication of circulars or lists of stone-producers or contractors which expressly or by implication classify the complainants or their products as unfair and deny that they have threatened any architect, owner, building-contractor or cut-stone contractor that they will suffer labor troubles, through strikes of stone-cutters, if they attempt to purchase or use the unfair stone in question.

D. Deny that they have instigated, incited or joined in strikes of stone-cutters or other craftsmen upon buildings in states other than Indiana because materials produced by complainants were being used therein, but admit that they have refused to work upon the class of stone herein repeatedly described.

E. Deny in toto and admit that members of union had been ordered to quit work upon the stone described.

F. Deny and say that contractors and builders have, during all the time complained of, employed men not members of the union to install complainants' products and deny that they have interfered with the work of such non-union men.

G. Deny and say that they have not picketed the quarries and shops of complainants and have in no wise attempted to induce employees, contractors and carvers to breach contracts.

APPELLANTS' SUMMARY OF IMPORTANT ADMISSIONS.

Respondents desire to correct what they believe to be an incomplete statement of "Important Admissions."

The provision in the Constitution of the General Union, viz: "No member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association. Any member violating this article shall become automatically suspended," was written into the said Constitution in 1912 and was not written into such Constitution in contemplation of the termination of the working agreement between complainants and respondents. The provision was adopted by representatives of the entire membership of all general and local unions in convention assembled. With the knowledge and consent of the respondents, all members of the union worked on all the complainants' products for three years after their working agreement terminated, and the order of July 7, 1924, to become effective August 1, 1924, resulted from a posting of notices in complainants' shops, which notices were as follows:

"NOTICE

On and after Monday, June 20, 1921, all stone-cutters and carvers employed in this mill must be members in good standing of the Stone-cutters' and Carvers' Union of the Indiana Limestone District in Lawrence and Monroe counties.

On and after Monday, June 20, 1921, all men operating planers, headers, shapers, lathes and milling machines in this mill must be members in good standing of the Planermen's Union of the Indiana Limestone District in Lawrence and Monroe counties."

Respondents further say that the posting of above notices and the enforcement of same was in fact "a lock-out" by complainants.

APPELLANTS' INSTANCES OF INTERFERENCE.

The instances of interference allege to have been caused by the enforcement of the Union order forbidding its members from handling certain of complainants' products are all based upon the affidavits submitted by appellants to the trial court. Many of these alleged interferences are fully explained or contradicted by the affidavits filed by respondents.

For the Court's convenience, we supplement appellants' references to the record by references to respondents' counter-affidavits:

Chicago—

Appellants' References—(pp. 70-81, 145-147, 156-157, 112.)

Respondents' References—(pp. 190-191.)

Lansing—

Appellants' References—(pp. 150-154.)

Respondents' References—(pp. 179-180-181.)

Kokomo—

Appellants' References—(pp. 81-83, 148-149.)

Respondents' References—(pp. 184-185.)

Upland-Peru—

Appellants' References—(p. 149.)

Respondents' References—(pp. 184-185.)

Indianapolis—

Appellants' References—(p. 112.)

Respondents' References—(p. 182.)

POINT I.

GENERAL OBSERVATIONS AS TO THE PURPOSE AND EFFECT OF THE SHERMAN ANTI-TRUST LAW AND OF ITS APPLICATION TO THE FACTS IN THIS CASE.

Appellants in their bill attempt to state a case arising out of the violation by appellees of the Sherman Anti-Trust Act and, by their evidence, they attempt to prove facts to show a violation of said act by appellees.

It is the position of appellees that the facts before the Court are not sufficient to show a violation of said act by appellees or to render them or any of them amenable to the provisions of said act.

The Sherman Act is aimed at trusts, monopolies, combinations and conspiracies having for their direct object the purpose to monopolize, in whole or in part, the trade

or commerce between states or with foreign nations, the primary purpose being to create a monopoly in handling or selling certain products, to stifle competition, and to enhance the price of the commodity to the injury of the public and to the financial advantage and gain of those connected with the unlawful combination or conspiracy. The purpose of the act was to protect the general public against the oppression and greed of such unlawful combinations and conspiracies.

The appellants were each engaged in quarrying and shipping building stone in interstate commerce. The stone so handled in interstate commerce and shipped was sawed and partly dressed; but, before it could be used in the building, it required further dressing and fitting.

The appellees are Journeymens Stone Cutters Association of North America, and the officers and certain members of that association. The purpose of that organization was to secure and maintain fair wages for its members, to improve working conditions and to maintain order and discipline among its members. Said organization is not engaged in trade or commerce in any commodity which is the subject of interstate trade, and the evidence fails to show that said organization or any of its members are in league with, or have any agreement, understanding or connection with any other person, corporation or association which is engaged in any business in competition with that of appellants. It can not be inferred from the evidence that the refusal of the members to work on the stone produced and shipped by appellant was prompted by a motive or purpose to cut down

the amount of Bedford stone moving in interstate commerce and thus reduce the supply so as to lessen or stifle the competition with other building stone and substitutes and thereby increase the price of such other building stones and substitutes therefor to the detriment of the public.

The facts to which the attention of the Court has just been called distinguishes the instant case from *United States vs. Brims*, 71 L. Ed. 194, on which appellants strongly rely in support of their contention in the case at bar.

In that case the respondents were, first manufacturers of mill work in the City of Chicago. The product manufactured by these respondents consisted of window and door fittings, such as baseboard, molding, cornice, etc.; second, building contractors who purchase and cause such mill work to be installed; and, third, representatives of the carpenters union whose members are employed by both the manufacturers and the contractors.

It appears that, prior to the agreement and understanding by and between the three classes of respondents mentioned, the manufacturers of mill work in Chicago had produced and sold their product in competition with manufacturers of a like product whose factories were located outside of Illinois—principally in Wisconsin and the South. These outside manufacturers shipped their product to Chicago and sold it on the market there at a price less than the Chicago manufacturers who employed union labor could afford to sell it. The primary purpose of respondents in that case was to eliminate the competition from other states and the manufacturers seem to

have been the prime movers in perfecting the agreement and understanding with the other respondents which was intended to produce and which did produce that result.

The Court says:

> "They wished to eliminate the competition of Wisconsin and other non-union mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install non-union made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The non-union mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and, as usual under such circumstances, the public paid excessive prices."

The appellees in the present case have a provision in the constitution which was adopted long before any controversy arose with appellants or any of them, which reads as follows:

> "No member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association. Any member violating this article shall become automatically suspended."

The Association and its members lived up to that provision by refusing to cut, carve or fit any such material either in Indiana or in other states. They did this and they did nothing more. They instituted no boycott against said material; they did not dissuage anyone from purchasing it or coerce anyone to prevent such a purchase. They made no attempt to prevent other persons from cutting and fitting said material.

The purpose of respondents was not directed against interstate commerce. Their sole and only purpose, as disclosed by the evidence was to unionize the cutters and carvers of stone at the quarries. As said by this Court in a recent case:

> "The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product."
>
> *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 459, at p. 471.

The provision of the constitution quoted was well calculated and adapted to carry out the purposes and to promote the ends which the association was organized to accomplish. One of such purposes was to supply employment at remunerative wages for members of the union and to that end it was thought desirable to unionize all places where stone-cutters and fitters were employed. In what appellees did, they had no intent or purpose to stifle competition or to increase prices, and they had no interest to be served in so doing. They were endeavorinl only to carry out the purposes of their organization in a legal manner; and, if their conduct in so doing had any effect in reducing the supply moving in interstate commerce, such effect was an incidental, indirect and remote obstruction to such commerce.

In the case of *Anderson v. United States*, 171 U. S. 604, this Court speaking on the subject said at page 616 of the opinion:

> "As is said in *Smith v. Alabama*, 124 U. S. 465, 473:
>
> > 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.'
>
> *The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and*

with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commrece for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

The decision of this case depends on whether the facts shown by the evidence show an intention and purpose to directly and immediately restrain interstate commerce or whether the primary intent and purpose was to carry into effect the purposes and objects of the labor association in such a way as to legitimately secure the ends for which that organization was formed.

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. *(Hopkins v. U. S.*, 171 U. S. 578-592). There are many cases however where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. *(Smith v. Ala.*, 124 U. S. 465-473). The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though

only indirectly and unintentionally affect interstate trade or commerce, in that event, we think the agreement would be good. *(Hopkins v. United States,* 171 U. S. 590.)"

It is the position of appellees that the facts of this case clearly show that the conduct of appellees does not fall within the inhibition of the statute under consideration.

CASES DISTINGUISHED.

The undisputed facts in the instant case make it clearly distinguishable from the authorities cited in appellants' brief in support of the proposition that "Appellees' Combination Violates the Sherman Anti-Trust Act."

Duplex Printing Press Co. v. Deering, 254 U. S. 443, was so cited. The Court found the acts complained of to be as follows:

> "The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being listed as "scabs" if they assisted

> in installing the presses; threatening an exposition company with a strike if it permitted complainants' presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses."

The Court applied the law declared in *Loewe v. Lawlor*, 208 U. S. 274, and found that the prayer for an injunction should be granted.

In *Loewe v. Lawlor*, the case went to the Supreme Court upon a certificate of question, viz., could plaintiffs maintain an action upon facts stated in the complaint under the Anti-Trust Act?

The means to be used by the defendant unions in their efforts to unionize plaintiff's factory included the following:

> "A boycott against all hats made for sale and sold and delivered, * * * by the plaintiffs to said wholesale dealers in states other than Connecticut, and to actively boycott the same and the business of those who should deal in same and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several states,"

to procure a similar boycott from affiliated labor unions belonging to the American Federation of Labor; to distribute circulars containing notices that the dealers in plaintiff's hats and their customers would be boycotted;

to threaten with boycott all customers who should buy any goods whatever, whether union made or not, from dealers who handled plaintiff's goods; to employ a large number of agents to call upon wholesale dealers and their customers and threaten them with loss of business if they should handle plaintiff's hats; to use the daily press and other periodicals to announce and advertise said boycotts.

The fact in the above cases and the undisputed facts in the instant case are so entirely different that the law declared by the Supreme Court in the above cases has no application to the case now before the Court. In above two cases, the purpose of the defendants to accomplish their object through obstruction to interstate commerce was palpable. The object and intention of the combination determined its illegality.

In the case of *Irving v. Neal*, 209 Fed. 471, cited by appellants, the bill alleged that defendants had put complainants on "unfair" lists and distributed such lists to builders, architects and owners and omitted Complainant's name from "fair" lists which were so sent to builders, etc., and accompanied by letters saying that the employment of such "fair" shops would avoid labor troubles. Said bill also alleged the calling of sympathetic strikes and that letters were sent to builders, architects and owners asking them not to contract with complainants because they were "unfair" concerns.

The Court granted an injunction under the authority of *Loewe v. Lawlor*, and similar decisions.

ATTACK ON COMMERCE OR PRODUCTION?

Appellants seek to distinguish the instant case from the law as declared in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, and *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 459, by denominating appellees' action as an attack on commerce and not on production.

The appellees insist that the attempted distinction is not justified by the undisputed facts in the present case nor does the same take the present case from under the rules laid down in such cases.

In *United Leather Workers v. Herkert & Meisel Trunk Co.*, the Court said:

> "It is only when the intent or the necessary effect upon such commerce in the article is to enable those who intentionally diminish its product, to monopolize its supply or control its price or discriminate as between its would-be purchasers, that such unlawful dimunition of its manufacture can be said directly to burden interstate commerce."

In the instant case there is no showing of the intent upon the part of the appellees to monopolize, control or discriminate as defined above, nor is there any showing of such results. In the absence of such showing, it is insisted by the appellees that it matters not whether that alleged attack be upon a product or upon a place.

Quoting further from the same case, the Court said:

> "The record is entirely without evidence or circumstances to show that the defendants in their

conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product.

We concur with the dissenting Judge in the Circuit Court of Appeals, when, in speaking of the conclusion of the majority, he said: 'The natural, logical and inevitable result will be that every strike in any industry or even in a single factory will be within the Sherman Act and subject to Federal jurisdiction provided any appreciable amount of its product enters into interstate commerce.' (284 Fed. 446, 464.)

We can not think that Congress intended any such result in the enactment of the Anti-Trust Act or that the decisions of this Court warrant such construction."

Distinguishing practically all of the cases cited in appellant's brief, in above case, the Court further said:

> "None of these cases, although they all illustrate the practical conception of interstate commerce as a flowing stream from one state to another formed by a regular course of business, can properly be said to support the argument that mere intentional cutting down of manufacture or production is a direct restraint of commerce in the product intended to be shipped when ready."

In *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, the Court said:

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. * * * * Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. * * * * Again, it (Congress) has the power to punish conspiracies in which such practices are part of the plan to hinder, restrain or monopolize interstate commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances." (Pp. 407-408.)

The facts in the instant case are peculiar in that they show an entire absence of those acts which usually accompany a strike or boycott. Cessation of work upon that class of stone which is produced by employers who are eligible to membership in the defendant unions is admitted. No other overt acts have been committed by appellees.

The intent to interfere with the interstate business of complainants is denied. The modicum of injury attempted to be proved by appellants is also denied. There is no intent proven to interfere with interstate commerce and the necessary effect of such cessation of work does not bring the action of appellees within the prohibited combinations declared in a long line of cases referred to in appellant's brief.

POINT II.

DISCRIMINATION BY COMPLAINANTS.

Upon this subject the record shows that from 1913 to 1921 the appellants and appellees worked together under an harmonious agreement (p. 159); that machine-men were always recognized by appellants as eligible to membership in the union; that since May 1, 1921, appellants have refused to so recognize machine-men as eligible to membership in the union (pp. 161-162-163); that at the annual convention of Cut Stone Contractors and Quarrymen held in Chicago in January, 1921, said Association refused to recognize planermen as members of the union (pp. 162-163); that said Association would make a working agreement with appellees which included only stone cutters and carvers (p. 162-163); that appellees agreed to continue working relations after May 1, 1921, but appellants refused (p. 163); that bulletins were posted in the shops and quarries of appellants which locked out appellees (pp. 163-164); that appellants organized what were known as "independent unions" (p. 165); that appellants organized the "Bedford Stone Club" (p. 165); that said "Club" managed the said "independent unions" and endeavored to enlist all contractors and quarriers in its effort to "lock out" union labor (pp. 165-172, inclusive); that after above action repeated overtures were made by appellees to negotiate an harmonious working agreement (pp. 162-163); that appellants refused to treat with appellees (pp. 163-164-165).

Appellees respectfully submit that the record shows that while the appellants refused to permit members of

the union to work in their shops and quarries, they invoke the courts for an order which they believe will force such members to work on appellants' product after it is produced by their so-called "independent unions." In other words, the appellants do not come into court with clean hands.

In *Iron Molders' Union v. Allis Chalmers Co.*, 166 Fed. at page 52, Grosscup, Circuit Judge, defines a lock-out as follows:

> "A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lock-out is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

We insist that this "cessation of the furnishing of work to employees" may be accomplished by closing the factory or promulgating and enforcing conditions of employment which are palpably adopted for the purpose of and do eliminate a class of workmen.

The facts in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, cited by appellants, are so entirely different from the facts in the instant case that the discrimination defined in such case as lawful has no application here. There the unions endeavored to induce employees of complainant to leave its employ by unlawful and malicious methods.

In the present case there is no evidence of the use of either unlawful or malicious methods upon the part of appellees to cause either the employers or employees to

breach their present contractual relations. Appellees by their conduct have completely acquiesced in appellants freedom to hire whomsoever they please. They have not disturbed nor attempted to disturb working relations which appear to be satisfactory to appellants. Having been barred from working in appellants' places of business, they are simply asking the same privilege as to appellants' product.

The exclusion of a plaintiff from the peculiar favors of courts of equity results where his conduct has been unconsionable by reason of a bad motive or where the result in any degree induced by his conduct will be unconsionable either in the benefit to himself or the injury to others.

Larschfield v. Kittell, 142 Wis. 172.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be sustained.

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